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CONFLICT OF LAWS INTERNATIONAL TORT CASES:  
The Need for Reform on Both Sides of the Tasman  
by  
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## I INTRODUCTION

The issue of which law to apply to resolve a tort case comprising elements from more than one jurisdiction is not an easy one to decide. Many different approaches have been tried and discarded by the courts. Some approaches provide for a general rule but include a flexible exception. Others provide for a completely flexible test. This article traces the Australian courts' latest attempts to deal with the matter, and documents recent developments in England, Canada and New Zealand. Reference is made to the vast North American jurisprudence in this area, in particular interest analysis, to suggest the way forward for Australian and New Zealand courts in this area, with a view to maintaining some flexibility in approach, while applying the law of the place of the wrong as the primary test. The author commends the High Court of Australia's (belated) rejection of the double actionability test and suggests that New Zealand might also consider rejecting that approach. However, it is submitted the Australian High Court should adopt a flexible exception, as have the courts in other countries, including New Zealand and Canada.

The Australian High Court in *Regie National des Usines Renault SA v Zhang*<sup>1</sup> (*Renault*) and *John Pfeiffer Pty Limited v Rogerson*<sup>2</sup> (*Pfeiffer*), after alluding to dissatisfaction with its previous double actionability approach in this area,<sup>3</sup> decided upon an apparently

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<sup>1</sup> (2002) 210 CLR 491.

<sup>2</sup> (2000) 203 CLR 503.

<sup>3</sup> As to which, refer to Peter Nygh 'The Miraculous Raising of Lazarus: *McKain v Miller and Co* (South Australia) Pty Ltd' (1992) 22 University of Western Australia Law Review 386, 394; Michael Pryles 'Of Limitations and Torts and the Logic of Courts' (1992) 18 Melbourne University Law Review 676; Michael Pryles 'The Law Applicable to Interstate Torts: Farewell to *Phillips v Eyre*?' (1989) 63 Australian Law Journal 158,181; Brian Opeskin 'Conflict of Laws and the Quantification of Damages in Tort' (1992) 14 Sydney Law Review 340; Australian Law Reform Commission *Choice of Law* (1992) No 58, 10.13, 10.41; Anthony Gray 'Conflict of Laws – Heading in the Wrong Direction?' (1994) 24 Queensland Law Society Journal 357. Much of the jurisprudence in this area has been influenced, at least until recently, by the so-called rule in *Phillips v Eyre* (1870) 6 LR QB 1, 28-29 that in order to bring an action in one country for a wrong committed abroad, 'the wrong must be of such a character that it would have been actionable if committed in (the country where the action was brought) ... secondly the act must not have been justifiable

simple choice of law rule in tort for both international and interstate Australian choice of law conflicts. The court decided that, generally, the law of the place of the wrong should be applied as the choice of law rule. This was the choice that eventually commended itself to the majority. The court noted this approach reflects community expectations as to the law to be applied,<sup>4</sup> and was in most cases easy to apply. Citizens understood that if they went to another jurisdiction, they would be subject to the rules and regulations of that jurisdiction. Liability would generally be fixed and certain.<sup>5</sup> Under this approach, liability was fixed by reference to geography, making it easier to promote laws that gave a favourable outcome.<sup>6</sup> The rule was simple to apply and led to certain results.<sup>7</sup> The court noted however, that in some cases, it may be difficult to ascertain the 'place of the wrong'.<sup>8</sup>

The author has previously argued against the double actionability rule on the basis that giving primacy to the law of the forum only encourages forum shopping. It is hard to justify today, if ever it were justifiable, why the forum law should have to recognize the action in order for it to proceed in the jurisdiction. There is no general reason why a forum court cannot apply the substantive law of another country, except perhaps in the very unusual case where the foreign law is offensive to public policy.<sup>9</sup> Why should forum law be applied, in cases where all or most of the links (or connective factors) are with the place of the wrong? As a result, the author would generally commend the High Court's recent moves towards adopting the law of the place of the wrong as the general rule to be applied. This move is consistent with moves in the United Kingdom and

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by the law of the place where it was done'. This single comment has had a remarkable influence on choice of law rules for torts conflicts throughout the common law world.

<sup>4</sup> *Pfeiffer*, supra n 2 at 540. At least one legal philosopher would agree – since Locke thought that citizens agreed to bind themselves to the law of the jurisdiction they lived in by their presence within the jurisdiction, he would logically agree that if a citizen traveled to another jurisdiction, they would be deemed to have agreed to submit themselves to the laws of that jurisdiction by virtue of their presence: John Locke *Second Treatise of Government* (1690) 119.

<sup>5</sup> (539); similar reasoning appears in the decision of the Supreme Court of Canada in *Tolofson v Jensen* [1994] 3 SCR 1022, 1050-1051. However the New York Court of Appeals in *Babcock v Jackson* (1963) 12 NY 2d 473, 191 NE 2d 279, 281 commented that 'despite the advantages of certainty, ease of application and predictability which it affords, there has in recent years been increasing criticism of the traditional rule (ie law of the place of the wrong) by commentators and a judicial trend towards its abandonment or modification ... (because) the theory ignores the interest which jurisdictions other than that where the tort occurred may have in the resolution of particular issues'.

<sup>6</sup> *Pfeiffer*, supra n 2 at 539.

<sup>7</sup> This decision was confirmed by the High Court in *Dow Jones and Company Inc v Gutnick* (2002) 210 CLR 575.

<sup>8</sup> *Pfeiffer*, supra n 2 at 538; a recent example is *Dow Jones*, involving an action for defamation brought by a Victorian resident in a Victorian court in respect of material uploaded in the United States. The High Court found that Victoria, being the place of publication, was the place of the wrong in this case, but that every place in which the material was published and in which the plaintiff's reputation suffered as a result was also a place of the wrong. As a result, the plaintiff could bring suit in each jurisdiction in which his reputation had been affected by the defamatory statements; cf *Cuccioli v Jekyll and Hyde Neue Metropol Bremen Theater Produktion GMBH and Co* (2001) 150 F Supp 2d 566, involving the unauthorized use of the plaintiff's likeness to promote a CD advertised on a website created and maintained in Germany, although accessible in the United States. The court found the wrong had occurred in Germany.

<sup>9</sup> The High Court in *Pfeiffer* gave many reasons for its abandonment of the double actionability approach.

Canada. The law of New Zealand is being increasingly isolated worldwide in its adherence to the *Phillips v Eyre* approach.

## II THE FLEXIBLE EXCEPTION AND QUESTIONS OF PUBLIC POLICY

In judgments and/or legislation in other countries, different approaches have been taken to the question of a so-called flexible exception to the general rule, as well as the content of the general rule. In the United Kingdom, some members of the House of Lords, having accepted the general rule as Willes J said in *Phillips v Eyre*,<sup>10</sup> considered a so-called flexible exception to the rule. Referring to similar provisions in the *Second American Restatement* supporting such an approach, Lord Wilberforce declared

I think that the necessary flexibility can be obtained through segregation of the relevant issue and consideration whether, in relation to that issue, the foreign rule ought as a matter of policy ... to be applied. For this purpose, it is necessary to identify the policy of the rule, to inquire to what situations, with what contacts, it was intended to apply; whether not to apply it ... would serve any interest the rule was devised to meet.<sup>11</sup>

Although not all Lords agreed with such a formulation, it was later unanimously adopted by the Privy Council in *Red Sea Insurance Co Ltd v Bouygues SA*<sup>12</sup>. Later codification of United Kingdom law in this area also recognized that a flexible exception applies to the general rule.<sup>13</sup>

This has also been the case in Canada, where the Supreme Court reconsidered the issue in *Tolofson v Jensen*.<sup>14</sup> While favouring the inflexible application of the law of the place of the wrong in that case, La Forest J took a different view of international torts conflicts:

Because a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining discretion in the court to apply our own law to deal with such circumstances

Similarly, recent cases in New Zealand have allowed a flexible exception to apply, where one country has the most significant relationship with the occurrence and the parties. In that case, the law of that country is to be applied. For example, in *Baxter v RMC Group PLC*,<sup>15</sup> the court found that although prima facie the law of New Zealand would be applied to resolve the case, the facts called for the application of British law, given that the wrong/s had occurred in Great Britain. New Zealand also continues to apply the

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<sup>10</sup> *Phillips*, supra n 3 at 28-29.

<sup>11</sup> *Chaplin v Boys* [1971] AC 356, 391; to like effect Lord Hodson (378) and Lord Pearson (406)

<sup>12</sup> [1995] AC 190, 206; confirmed more recently in *Kuwait Airways Corporation v Iraq Airways Company and Others* [2002] UKHL 19.

<sup>13</sup> *Private International Law (Miscellaneous Provisions) Act 1995* s12 (the legislation also changes the general rule away from double actionability to the primacy of the law of the place of the wrong).

<sup>14</sup> [1994] SCR 1022; see generally *Unifund Assurance Co v Insurance Corp of British Columbia* [2003] 2 SCR 63 and *Wong v Wei* (1999) 65 BCLR (3d) 222.

<sup>15</sup> [2003] 1 NZLR 304; see also *Kunzang v Gershwin Hotel* (High Court, Auckland, 19/9/2000) and *Starlink Navigation Ltd v The Ship 'Seven Pioneer'* (2001) 16 PRNZ 55 where the court applied the double actionability approach.

*Phillips v Eyre* rule, on the basis of double actionability. If both limbs are satisfied, the law of the forum is the prima facie rule to be applied in that country.<sup>16</sup>

One also refers to the American Law Institute's *Second Restatement*, which avoids a presumption in favour of either law, but instead requires application of whatever law has the most significant relationship to the occurrence and the parties. Various factors are listed to be taken into account, including the place where the injury occurred, the place where the conduct causing the injury occurred, the residence and nationality of the parties, and the place where the relationship between the parties, if any, is centred. Relevant policies of the forum and other interested States are also relevant.<sup>17</sup>

The flexible exception has also appealed to former members of the High Court of Australia. For example in *Breavington v Godleman*<sup>18</sup> and other cases, adoption of the law of the place of the wrong as the primary rule has been accompanied for some judges by what may be termed a 'flexible exception', as it was described in *Chaplin v Boys* per Lord Wilberforce.<sup>19</sup> This exception might apply where the place of the wrong is in some sense fortuitous.<sup>20</sup>

However, in *Pfeiffer* the court rejected a flexible exception, at least in cases involving intra-Australian torts. Their conclusion was that:

[A]dopting any flexible rule or exception to a universal rule would require the closest attention to identifying what criteria are to be used to make the choice of law. Describing the flexible rule in terms such as "real and substantial" or "most significant" connection with the jurisdiction will not give sufficient guidance to courts, to parties, or to those like insurers who must order their affairs on the basis of predictions about the future application of the rule. What emerges very clearly from the United States experience in those States where the proper law of the tort theory has been adopted is that it has led to very great uncertainty. That can only increase the cost to parties, insurers and society at large.<sup>21</sup>

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<sup>16</sup> The emphasis on the law of the forum as the choice of law after applying the Phillips test as a double actionability rule is reminiscent of the High Court's decisions in *Koop v Bebb* (1951) 84 CLR 629 and *McKain v Miller* (1992).

<sup>17</sup> s6, s145

<sup>18</sup> (1988) 169 CLR 41.

<sup>19</sup> Interestingly, a flexible exception was also applied by State Courts, for example *Warren v Warren* [1972] QdR 386. Matthews J applied Queensland law to litigation relating to a car accident that happened in New South Wales. Both parties were Queensland resident – the judge allowed the claim although they would have been statute barred in New South Wales, holding there was flexibility in the Phillips rule. A similar result occurred in *Corcoran v Corcoran* [1974] VR 164, allowing one Victorian resident to sue another Victorian resident in relation to an accident occurring in New South Wales.

<sup>20</sup> *Chaplin*, supra n 11 at 389, per Lord Wilberforce: 'to fix the liability of two or more persons according to a locality with which they may have no more connection than a temporary accidental and perhaps unintended presence may lead to an unjust result', accepted in *Breavington* by Mason CJ at page 76 and Toohey J at page 162. It has also been applied to justify the exclusive application of the law of the place of the wrong: *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190.

<sup>21</sup> *Pfeiffer*, supra n 2 at 538.

The court reconsidered the issue of the flexible exception, in relation to international torts, in the *Renault* case. Given the strenuous reasoning above for rejecting any flexibility in respect of intra-national torts, one might have expected the court to take the same approach as it took in *Pfeiffer*, rejecting (entirely) the so-called exception for the reasons above. The court did not do so. The court certainly made it clear that the choice of law rule was to be the law of the place of the wrong, without any resort to a flexible exception:

The submission ... is that the reasoning and conclusion in *Pfeiffer* that the substantive law for the determination of rights and liabilities in respect of intra-Australian torts is the (law of the place of the wrong) should be extended to foreign torts, despite the absence of the significant factor of federal considerations, and that this should be without the addition of any “flexible exception”. That submission should be accepted.<sup>22</sup>

However, after considering the Canadian Supreme Court’s *Tolofson* decision taking a similar approach, the court added the following comment:

Questions which might be caught up in the application of a “flexible exception” to a choice of law rule fixing upon the (law of the place of the wrong) in practice may often be subsumed in the issues presented on a stay application, including one based on public policy grounds.<sup>23</sup>

Kirby J preferred to reserve the question whether there was a flexible exception in relation to international torts, but held the exception did exist. He referred to the majority’s linking of public policy arguments with the flexible exception, but noted that *Chaplin v Boys*, where the exception was applied by some judges, was not a case where public policy could have been raised as an argument.<sup>24</sup>

The approach in the joint judgment suggests that the court sees the role of the flexible exception as relating more to jurisdiction, rather than the choice of law to be applied to resolve the dispute. However, this approach was specifically rejected by Toohey J in

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<sup>22</sup> *Renault*, supra n 1 at 520.

<sup>23</sup> *Ibid*, 519. This approach has been discarded in the United Kingdom. Writing in 1989 (i.e. pre-legislative reform in the United Kingdom) of a case brought in a United Kingdom court involving elements of a tort committed both in that jurisdiction and New York, Fentiman made the comments: “[The decision] ... confirms the suspicion that substantive tortious conflicts will seldom arise in England because such disputes can be disposed of at the jurisdictional stage. First, the case emphasizes how the likely substantive outcome of a dispute can govern questions of jurisdiction, turning as it did on the plaintiffs’ need to establish a good arguable case against the defendants. Second, it confirms the tendency to regard the courts of the place where a tort is (substantially) committed as the *forum conveniens* .. The theoretical importance of this tendency is that it casts further doubt on the scope of the *forum conveniens* doctrine generally”: Richard Fentiman “Torts – Jurisdiction or Choice of Law?” [1989] *Cambridge Law Journal* 191,193.

This approach was abandoned six years later when the United Kingdom Parliament passed the *Private International Law (Miscellaneous Provisions) Act 1995*, which provided for the primary of the law of the place of the wrong (where the most significant elements of the facts constituting the tort occurred or the law of the place of injury in cases of personal injury), subject to a flexible exception where it would be “substantially more appropriate” for the issues to be resolved *by another law* (emphasis added, and note the provision does not state that the exception will apply where it is substantially more appropriate for the issues to be resolved by another court, as the questions are, although related, distinct).

<sup>24</sup> *Renault*, supra n 1 at 535.

*Breavington*.<sup>25</sup> Moreover, when it was originally conceived in *Chaplin v Boys*, the ‘flexible exception’ was used as part of the process of deciding which law to be applied, i.e. it was a choice of law rule, and not a matter only of jurisdiction. If the parties had a merely incidental connection with the place of the wrong, its law was not to be applied on policy grounds. Lord Wilberforce’s double actionability test in *Chaplin*<sup>26</sup> was subject to a flexible exception based on ‘an account of the varying interests and considerations of policy which may arise when one or more foreign elements are present.’<sup>27</sup> The Supreme Court of Canada itself applies the flexible test not merely to questions of jurisdiction, but to the choice of law question,<sup>28</sup> as do the New Zealand courts.<sup>29</sup>

If, contrary to the experience in all other common law jurisdictions, the High Court of Australia continues in future to view public policy arguments as going to jurisdiction only, it should clarify in what circumstances it would permit a stay of proceedings based on public policy grounds. The High Court in *Renault* mentioned the inherent jurisdiction of a court to stay proceedings brought before it for various reasons, including that the forum is ‘inappropriate’.<sup>30</sup> This has been interpreted narrowly in Australia to mean if continuation of the proceedings in that court would be oppressive, in the sense of ‘seriously and unfairly burdensome, prejudicial or damaging, or vexatious, in the sense of productive of serious and unjustified trouble or harassment’.<sup>31</sup> The ends of justice were paramount. One relevant factor was whether the substantive law of the forum was the law of the cause (ie in this context, the law of the place of the wrong). Another was the presence of connecting factors between the plaintiff or the defendant, and the forum jurisdiction.

So, with respect, arguably the precise scope of the flexible exception in relation to conflict of laws in tort is unclear.<sup>32</sup> The High Court has said it does not apply to intra-

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<sup>25</sup> Supra n 18 at 171. ‘The argument on behalf of the appellant that if the forum chosen by him is not the natural or appropriate forum, his action may be stayed, is not sufficient. The question is not one of *forum non conveniens*; it is more deeply rooted than that.’

<sup>26</sup> 391. This approach has been adopted at common law by the Privy Council in *Red Sea* and by the House of Lords in *Kuwait Airways Corporation v Iraqi Airways Company* [2002] UKHL 19

<sup>27</sup> This is also the sense in which the ‘proper law’ exception is used in the *Private International Law (Miscellaneous Provisions) Act 1995* (UK), as a question going to the choice of law rather than jurisdiction.

<sup>28</sup> *Unifund Assurance Co v Insurance Corp of British Columbia* [2003] 2 SCR 63

<sup>29</sup> The law is as stated by O’Regan J in *Baxter v RMC Group PLC* [2003] 1 NZLR 304, 318:

- (a) a tort is actionable in New Zealand only if it is actionable both in New Zealand and England. If this rule (the double actionability rule) is satisfied, then the substantive law to be applied is the law of New Zealand;
- (b) However, if one country has the most significant relationship with the occurrence and with the parties, the substantive law of that country is to be applied

<sup>30</sup> The High Court’s approach on forum questions has not escaped criticism from the experts. See for example Peter Nygh and Martin Davies *Conflict of Laws in Australia* 7<sup>th</sup> edition (2002) 129, criticizing the *Voth* decision as out of step with other countries in the Commonwealth, encouraging of forum shopping, and internally inconsistent.

<sup>31</sup> *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

<sup>32</sup> Others might suggest that the High Court in *Pfeiffer* and *Renault* have unequivocally precluded any exception in relation to the choice of tort law, though acknowledging the flexibility of courts in application of *forum non conveniens*. The Court did reject application of a flexible exception. This author argues the position remains open because of the High Court’s comment in *Renault*, supra n 1 at 519 that ‘questions

Australian torts. In relation to international torts, the Court says it does not apply to the choice of law decision, but relates to arguments about jurisdiction. Given that this is not how the exception was conceived by Lord Wilberforce in *Chaplin v Boys*, how it is now written in British legislation, or in the United States where it has been tied into the debate about the proper law of the tort (i.e. in relation to a decision about choice of law *not* jurisdiction), nor how it is applied in New Zealand, there is little support for this approach, other than dicta in one Canadian Supreme Court decision. This of itself does not mean it is incorrect, but it is suggested the High Court should elaborate on the reasons for its approach, acknowledge its departure from the United States and English jurisprudence in the area, and explain precisely how, as it has suggested, ‘public policy’ is relevant to questions of jurisdiction.

### III WHERE THE PLACE OF THE WRONG IS FORTUITOUS OR INCIDENTAL

Adapting the facts of *Chaplin v Boys*, assume that two Australian soldiers were involved in a collision while driving in Malta. Both soldiers had been stationed there temporarily. Assume the law in Malta regarding personal injuries remains materially different from the law in Australia. If an action were brought in an Australian court in respect of the accident, what is the Australian court to do? Should it:

- (a) hear the action and apply the now-accepted general rule that the law of the place of the wrong (here Malta) should apply
- (b) decline to hear the action because an Australian court is a ‘clearly inappropriate forum’ (as we have seen, the Court has said one relevant factor here is which substantive law is to be applied – here it would be Maltese. If the parties are Australian citizens, it is difficult to say that an Australian court is ‘clearly inappropriate’)
- (c) hear the action, but discard the now-accepted general rule that the law of the place of the wrong should apply, on the basis of public policy arguments that Australia has a closer connection with the parties, so Australian law should apply.<sup>33</sup>

Based on what the High Court said in *Renault*, the third possibility could be discarded. The Court did not see the flexible exception as relating to the question of choice of law. Given that the ‘clearly inappropriate forum’ test is such a difficult one to satisfy, one would think it likely that the first possibility would be the most likely outcome.

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which might be caught up in the application of a ‘flexible exception’ to a choice of law rule fixing upon the *lex loci delicti* in practice may often be subsumed in the issues presented on a stay application, including one based on public policy grounds’. The author believes this statement is an important one, in that the High Court recognizes its power to invoke public policy considerations as a basis for declining to exercise jurisdiction.

<sup>33</sup> This approach would apparently be supported by the decisions of Lord Wilberforce in *Chaplin*, Mason CJ in *Breavington*, and the United States decision of *Babcock v Jackson*



How does the High Court's 'public-policy-in-the-context-of-jurisdiction' test apply here, if at all? Is this the kind of case where an Australian court might, on the grounds of public policy, refuse to hear the action because an Australian court is a clearly inappropriate forum?<sup>34</sup> It has been noted that this is a very difficult test to satisfy, so arguably not, at least according to participants in the joint judgment in *Renault*. The position of Kirby J is more equivocal. He considered the arguments in favour of and against a flexible exception, concluding that he would rather leave the question whether to recognize a flexible exception "*where the law of the foreign jurisdiction is such as to justify an Australian court's declining to recognize or enforce the law of that place*" (emphasis added). He reiterated:

The general rule is that stated in Pfeiffer. In international torts, there is an exception to the application of that general rule. That exception may be invoked by reference to public policy considerations that would make the enforcement by the forum of the law of the place of the wrong contrary to the public policy of the forum.<sup>35</sup>

In commenting on the majority's opinion that questions of public policy would often in practice be subsumed on questions of *forum non conveniens*, he said this 'need not be so'. He referred to the situation in *Chaplin v Boys* as one case, where the flexible exception applied and the law of the place of the wrong did not apply. This was not because application of Maltese law was contrary to public policy. These comments by Kirby J suggest that his Honour would consider arguments about public policy as going to the choice of law (as Lord Wilberforce did in *Chaplin*), rather than a question of jurisdiction only. It is acknowledged, however, that Kirby J expressly reserves the question for a future time.

To further support Kirby J's observations, consider how the High Court would handle the facts of *Kuwait Airways Corporation (KAC) v Iraqi Airways Company (IAC)*,<sup>36</sup> with some variations. The actual facts involved the confiscation by an Iraq government of property owned by KAC in Kuwait. The government eventually gave them to IAC. KAC sought the return of their aircraft, suing for the tort of conversion. If we assumed that KAC was an Iraq-based company, all of the links involve Iraq – the place of the wrong and the place of residence of both parties, so this would not created many difficulties.

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<sup>34</sup> Canadian scholars are skeptical. In "Back to the Future! Is the New Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?" (1995) 33 Osgoode Hall Law Journal 35, 69 Jacqueline Castel asks: 'Can the doctrine of forum non conveniens really play a significant role as a substitute for actionability by the law of the forum or public policy if the forum is the most appropriate forum or the natural forum? Consider the case where the cause of action created by the law of the place of the wrong is not known to the forum but both parties are resident or domiciled in the forum. In such a case the court cannot declare itself forum non conveniens. It must take jurisdiction and apply the law of the place of the wrong to the exclusion of the law of the forum ... Only where the forum is not connected with the action, that is, not the appropriate jurisdiction based on all relevant factors, could it declare itself forum non conveniens.'

<sup>35</sup> *Renault*, supra n 1 at 535. Another discussion of policy issues occurs in J J Fawcett, 'Policy Considerations in Tort Choice of Law' [1984] Modern Law Review 650.

<sup>36</sup> [2002] UKHL 19.

However, assume that KAC was actually based in Australia, so there was a substantive link between Australia and the matter. Would the High Court now still be able to decline to hear the matter on the basis of *forum non conveniens*? How would the majority apply its test?

Questions which might be caught up in the application of a “flexible exception” to a choice of law rule fixing upon the (law of the place of the wrong) in practice may often be subsumed in the issues presented on a stay application, including one based on public policy grounds

It is submitted that in order to apply this test to avoid the application of Iraqi law (which would justify the confiscation) the High Court would have to strain the ‘clearly inappropriate forum’ test to try to argue that Australia had no connection to and thus should not hear the matter. But this doesn’t really solve the problem – surely the correct result is that while we have no problem in an Australian court hearing the matter, the Australian court should decline to apply Iraqi law on the basis of public policy. (This is in fact the result achieved by the House of Lords in applying the flexible exception to the facts.) It is submitted the High Court of Australia would find it very difficult to come up with the same result by applying the awkward test is postulated in the *Regie* case, and this is reason for the court to re-think its opposition to a flexible exception *choice of law* rule.

The question of the use of policy then is debatable, and it is submitted, with respect, that the court needs to clarify its use of ‘public policy’.<sup>37</sup> Again, it is acknowledged that the majority of the High Court in *Renault* indicated support of the then Canadian line that public policy is relevant only to questions of jurisdiction. However, given the Canadian courts’ since-expanded use of policy considerations to include choice of law, given policy as used in the United Kingdom has been somewhat broader, the view of some High Court judges (at different times, Toohey, Mason and Kirby JJ) that policy is relevant to choice of law questions, and the turbulent history of this area of the law, it is considered possible that a future High Court may consider policy arguments in relation to the choice of law question, rather than merely jurisdiction. Of the current members, at least Kirby J would apparently support this expansion.<sup>38</sup>

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<sup>37</sup> For the High Court’s difficulties with policy issues recently in the context of recovery for personal injury, see for example *Gala v Preston* (1991) 172 CLR 243, *Perre v Apand Pty Ltd* (1999) 198 CLR 180 and *Cattanach v Melchior* (2003) 199 ALR 131. A detailed study of this jurisprudence is beyond the scope of this paper, but they are included as an example of differences among the Court as to the use of policy in deciding negligence cases. Most recently, Callinan J in *Cattanach*, at page 209, called for judges to be explicit if they were deciding negligence claims based on policy, rather than explain decisions on other grounds.

<sup>38</sup> Discussion of the distinction between substance and procedure is considered to be beyond the scope of this paper. However, one should note that policy considerations have also been considered relevant in making this distinction. For example, New York courts have classified statutes prohibiting recovery for wrongful death as procedural, and refused to apply them to suits brought in New York based on an accident occurring in a state with legislation barring suits for wrongful death. This was because ‘for our courts to be limited by the Massachusetts damage ceiling (at least to our own (residents)) is so completely contrary to our public policy that we should refuse to apply that part of the Massachusetts law’: *Kilberg v Northeast Airlines Inc* (1961) 9 NY 2d 34, 172 NE 2d 526, *Miller v Miller* (1968) 22 NY 2d 12 and *Tooker v Lopez*

The situation where the place of the wrong has little or no connection with the parties other than the fact that the incident occurred there, is the Achilles Heel of an inflexible application of the law of the place of the wrong. Not surprisingly, it was the *raison d'être* for the flexible exception recognized by Lord Wilberforce in *Boys*:

The tort here was committed in Malta; it is actionable in this country. But the law of Malta denies recovery of damages for pain and suffering. Prima facie English law should do the same: if the parties were both Maltese residents it ought surely to do so; if the defendant were a Maltese resident the same result might follow. But in a case such as the present, where neither party is a Maltese resident or citizen, further enquiry is needed rather than an automatic application of the rule. The issue, whether this head of damage should be allowed, requires to be segregated from the rest of the case ... related to the parties involved and their circumstances, and tested in relation to the policy of the local rule and of its application to these parties ... So segregated, the issue is whether one British subject, resident in the United Kingdom, should be prevented from recovering ... against another British subject ... damages for pain and suffering which he cannot recover under the rule of the *lex delicti*.. Nothing suggests that the Maltese state has any interest in applying this rule to persons resident outside it, or in denying the application of the English rule to these parties.<sup>39</sup>

Surely, the general rule needs to be applied with some flexibility to deal with the issue whether the place of the wrong has no interest in its law being applied to the matter in dispute. The need for such flexibility has been recognized in the United Kingdom, United States, New Zealand and Canada. It is ridiculous for an Australian court to attempt to deny the need for such flexibility in the light of its recognition elsewhere. Such an approach might also ask whether the purpose behind the relevant rules would be furthered by their application in the particular case. Various formulations of the suggested exception will now be considered.

#### IV FLEXIBILITY - OTHER APPROACHES

At the outset one should note that a variety of other approaches have been taken to resolve these difficult issues. There is not as much consistency in the use of terms, including the use of the terms 'policy', 'proper law', 'interest analysis', as one would like. Policy is used in different ways, sometimes as an exception to the general choice of law rule, sometimes in determining what the governing law should be in the first place. Sometimes interest analysis is seen as a distinct approach in itself, sometimes it is said to have been combined with a proper law approach.<sup>40</sup> Though there may be some relation

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(1969) 24 NY 2d 569. Based on its comments in *Renault*, it seems the High Court might agree with this reasoning and apply it in an appropriate case. On the other hand, if it continues to follow the Canadian line in this area, the Canadian court in *Tolofson* held that the limitation period of the law of the place of the wrong should not be rejected by the forum court on the basis of differing policy approaches to limitation questions.

<sup>39</sup> *Chaplin v Boys* [1971] AC 356, 392.

<sup>40</sup> An example of the latter is contained in the Australian Law Reform Commission's *Choice of Law Report* (1992) para 6.65. It recommended that 'in interstate torts, the court take into account the purpose and

and overlap between the two, for the purposes of this article (and for the purposes of conceptualizing the law in this area) the author thinks it better to discuss them separately.

### *Proper Law of the Tort*<sup>41</sup>

It is worth bearing in mind two points in this context:

- (a) that the original *American Restatement* in the area of conflict of laws called for the strict application of the law of the place of the wrong, only to be later replaced by the revised *Restatement* which calls for an interest-weighting approach; and
- (b) the weighing of different interests accords with the accepted approach (including in Australia) of dealing with conflict issues in relation to contracts,<sup>42</sup> thus providing a harmonized approach in the two areas of law. As James noted in relation to the *Pfeiffer* case, ‘it is unfortunate that the outcome of his case may have been different had it been framed in contract’.<sup>43</sup>

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object of laws in deciding whether to replace the *lex loci* with the place of greater connection’. Nygh also conflates interest analysis with proper law thus: ‘The proper law of the tort approach employed in the United States depends upon interest analysis, rather than jurisdiction selecting choice of law rules’. Peter Nygh and Martin Davies *Conflict of Laws in Australia* 7<sup>th</sup> ed. (2002) 428-29. Lord Wilberforce in *Chaplin v Boys* also related the two, as did Mason CJ in *Breavington v Godleman*.

<sup>41</sup> Morris, J H C ‘The Proper Law of the Tort’ (1951) 64 *Harvard Law Review* 881

<sup>42</sup> *Merwin Pastoral Co Ltd v Moolpa Pastoral Co Pty Ltd* (1933) 48 CLR 565, *Rothwells Ltd (In Liq) v Connell* (1993) 119 ALR 538. See Lawrence Collins ‘Interaction Between Contract and Tort in the Conflict of Laws’ (1967) 16 *International and Comparative Law Quarterly* 103. Brainerd Currie used some contracts examples to demonstrate interest analysis, e.g., the classic case of *Milliken v Pratt* (1878) 125 Mass 374, involving a conflict between a Massachusetts law denying contractual capacity to married women, and the contrary Maine law, in an action by a Maine creditor against a Massachusetts married woman. Currie saw this as involving a conflict between the policy of Maine law to protect the security of transactions and its intended beneficiaries to be resident Maine creditors, and the policy of Massachusetts, involving subordinating the policy of protecting the security of transactions to that of protecting married women against economic exploitation: Currie *Selected Essays on the Conflict of Laws* (1963) 85.

<sup>43</sup> Elizabeth James ‘John Pfeiffer Pty Ltd v Rogerson: The Certainty of Federal Choice of Law Rules for Intrastate Torts: Limitations, Implications and a Few Complications’ [2001] 23 *Sydney Law Review* 145, 163. The development of interest analysis has also been connected with legal realism theory: see Michael Green ‘Legal Realism, Lex Fori and the Choice of Law Revolution’ (1995) 104 *Yale Law Journal* 967; per Catherine Walsh ‘Territoriality and Choice of Law in the Supreme Court of Canada: Applications in Product Liability Claims’ (1997) 76 *Canadian Bar Review* 91, 99 ‘Legal realism is widely acknowledged to be the impetus behind ... a result-oriented jurisprudence under which the advancement of local policies and local concepts of justice guides choice of law adjudication in the same way as it does other categories of domestic adjudication’.

As indicated, *The American Restatement 2d, Conflict of Laws*,<sup>44</sup> embraces the theory of the ‘proper law of the tort’, or the tort law of the place with the closest connection with the parties (s145). Section 145(2) of the *Restatement* specifies that the following are relevant in relation to tort choice of law questions:

- (i) the place where the injury occurred;
- (ii) the place where the conduct causing the injury occurred;
- (iii) the domicile, residence, nationality, place of incorporation and place of business of the parties; and
- (iv) the place where the relationship, if any, between the parties is centered.

The Restatement provides that the above ‘contacts’ are to be evaluated according to their relative importance with respect to the particular case.<sup>45</sup>

The court in *Pfeiffer* in rejecting the proper law approach, noted that usually, when applying the test, the law of the forum had been adopted.<sup>46</sup> There is some analogy with the concept of the proper law of the tort, and the application of the so-called flexible exception, in that some judges who apply the flexible exception approach apply the law of the place of the wrong as the primary rule, subject to an exception where another place is more closely connected with the parties and the events.<sup>47</sup>

However, issue may be taken with the High Court’s (very brief) review of the state of the United States authorities, and the conclusion drawn in the joint judgment in *Pfeiffer* that there is some trend back towards the application of the place of the wrong rather than the proper law. The proper law of the tort remains the predominant rule used in the United States.<sup>48</sup> The New York Court of Appeals decision of *Babcock v Jackson*, in which a balancing of interests proper law approach was taken, has never been overruled in that

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<sup>44</sup> American Law Institute, *Restatement (Second) of Conflict of Laws* (1971), an approach referred to with approval by Lord Wilberforce in *Chaplin v Boys* [1971] AC 356, 391-392.

<sup>45</sup> The first version of the *Restatement* favoured the law of the place of the wrong as the sole rule to be applied. The court noted in *Pfeiffer* that the proper law approach had recently been criticized in the literature, and referred to suggestions the approach was inherently subjective rather than logical. A critique of the approach is found in Adrian Briggs ‘Choice of Law in Tort and Delict’ (1995) *Lloyd’s Maritime and Commercial Law Quarterly* 519.

<sup>46</sup> *Pfeiffer*, supra n 2 at 538.

<sup>47</sup> Lord Wilberforce in *Chaplin*, Mason CJ in *Breavington v Godleman* (1988) 169 CLR 41, and the United States Supreme Court decision in *Babcock v Jackson* (1963) 240 NYS 2d 742; this issue will be considered in more detail later in the article. Lord Wilberforce pointed out in *Chaplin* that the Second American Restatement formulation ‘has what is very necessary under a system of judge made law, the benefit of hard testing in concrete applications’. *Chaplin*, supra n 44 at 391.

<sup>48</sup> Kirby J in *Renault* conceded this point, referring to States of the United States: ‘Some jurisdictions that previously adhered to applying the law of the place of the wrong have tended more recently towards introducing greater flexibility in the rules ... a judicial revolution (has) resulted in the widespread abandonment of the rule of the place of the wrong’. Supra n 2 at 536. (often after legislation had been introduced, and not without its own difficulties). The United Kingdom’s *Private International Law (Miscellaneous Provisions) Act* 1995 allows for a proper law exception to be invoked, whenever it would be ‘substantially more appropriate’ for the issue/s to be resolved by another law.

State.<sup>49</sup> A recent (1998) survey named only 11 of the United States as those applying a strict rule of the law of the place of the wrong. United States commentators have viewed the position in the United States as follows:

As the century draws to a close, the traditional theory in tort (favouring the place of the wrong) ... finds itself in a very precarious state. This assessment is based not simply on the relatively low number of states that still adhere to that theory, but also on the shallowness of their commitment to it. Although the degree of commitment varies from state to state, it is fair to say that very few of these states are philosophically committed to the traditional theory ... in some of these states, the (law of the place of the wrong) rules remain in place only because the highest court of the particular state has yet to encounter the "right case" for seriously considering their abandonment.<sup>50</sup>

One Australian author has concluded that 'clearly, the High Court has misconceived any revival of support for the *lex loci* in the United States',<sup>51</sup>.

The United Kingdom's torts choice of law legislation, the *Private International Law (Miscellaneous Provisions) Act* 1995, also may require an evaluation of connecting factors. However, this is in a different way – where a primary rule is subject to displacement based on connecting factors, rather than in the *Restatement*, where the connecting factors comprise the general rule. Its primary rule, that the law of the place of the wrong governs substantive issues, is subject to the application of another country's law instead if, having considered the significance of the factors that connect a tort with the country in which it was committed, and the country factors that connect a tort with the other country, 'it is substantially more appropriate for the applicable law to be the law of that other country' for the purposes of determining the issues.<sup>52</sup> The Australian Law

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<sup>49</sup> The approach commended itself to Mason CJ in *Breavington*, supra n 18 at 76.

<sup>50</sup> Symeon Symeonides 'Choice of Law in the American Courts in 1998' [1999] 47 American Journal of Comparative Law 328, 345; see generally Symeon Symeonides 'Choice of Law in the American Courts in 2001' (2002) 50 American Journal of Comparative Law 1, 61 (Ten states continue to apply the law of the place of the wrong approach, with two of these applying a policy exception to avoid it in 2001.), Symeon Symeonides 'Choice of Law in the American Courts in 1996: Tenth Annual Survey' (1997) 45 American Journal of Comparative Law 447. A leading authority on American choice of law, Weintraub, confirmed swift acceptance of the influential role of policy and interest analysis since cases in the 1950s and 60s: Russell Weintraub *Commentary on the Conflict of Laws* 3<sup>rd</sup> ed, (1986) 315-316. The 1991 Supplement (66) confirms 'The courts of thirty-five states .. have displaced the place of wrong rule as the sole choice of law rule for torts'. One Australian author has concluded that 'clearly, the High Court has misconceived any revival of support for the *lex loci* in the United States': Elizabeth James 'John Pfeiffer Pty Ltd v Rogerson: The Certainty of Federal Choice of Law Rules for Intranational Torts: Limitations, Implications and a Few Complications' [2001] 23 Sydney Law Review 145, 158.

<sup>51</sup> Elizabeth James 'John Pfeiffer Pty Ltd v Rogerson: The Certainty of Federal Choice of Law Rules for Intranational Torts: Limitations, Implications and a Few Complications' [2001] 23 Sydney Law Review 145, 158.

<sup>52</sup> Section 12(2); the Privy Council had concluded in *Red Sea Insurance Co v Bouygues SA* [1995] 1 AC 190, 206 that 'the law of England recognizes that a particular issue between the parties to litigation may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and with the parties'.

Reform Commission proposed a similar approach be adopted in Australia, and specifically rejected a proper law approach as the general choice of law rule.<sup>53</sup>

New Zealand favours double actionability leading to the law of New Zealand as the substantive law of the forum to be applied subject to an exception if another country has the more significant relationship with the parties. However, one wonders whether this is purely an adoption of the British approach, or a real commitment to double actionability.<sup>54</sup>

### *Interest Analysis*<sup>55</sup>

Some in the United States have suggested that interest analysis may assist in the resolution of conflict of law issues in tort.<sup>56</sup> Though not immune from criticism,<sup>57</sup>

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<sup>53</sup> Australian Law Reform Commission *Choice of Law* (1992) No 58, *Choice of Law Bill*, clause 6(8).

<sup>54</sup> *Baxter v RMC Group PLC* (2003) NZLR 304, 318; in *Richards and Others v McLean and Others* [1973] 1 NZLR 521, the judge seemed, with respect, reluctant to apply the law of the forum as the substantive law – Mahon J noted that ‘the application of English law as the dominant substantive law might not in many cases be objectionable having regard to the greater interest which the foreign country might have in the commission of the tort and its consequences’ at 524, but was ‘obliged to say that the first condition in *Phillips v Eyre* (requiring actionability according to the law of the forum) was on the balance of authority a choice of law rule and not a rule of jurisdiction’ at 525. The judge did not say that he agreed with the approach; nor did he refer to much by way of support for the position. See also Nicky Richardson ‘Double Actionability and the Choice of Law’ (2002) Hong Kong Law Journal 491.

<sup>55</sup> A leading American authority on choice of law rules, Russell Weintraub, wrote in his *Commentary on the Conflict of Laws* 3<sup>rd</sup> ed (1986) 315-316. that there had been a swift acceptance of the influential role of policy and interest analysis since the landmark decision in *Schmidt v Driscoll Hotel* (1957) 82 NW 2d 365. In that case, the court applied Minnesota law to an accident that took place in the State of Wisconsin. Minnesota law allowed a person injured as a result of the intoxication of another to sue for compensation the person who caused the intoxication, in this case the owners of a hotel in Minnesota. Wisconsin law did not recognize such an action. The parties involved were both residents of Minnesota, the defendant was licensed there, and was served alcohol there. The court found that Minnesota law applied, with Minnesota having an interest in admonishing a liquor dealer whose violation of its statutes was the cause of injuries to a local resident, and in providing for a remedy for the injured person. See also Robert Leflar, *American Conflicts Law* 3<sup>rd</sup> ed (1977) 195 setting out a number of choice-influencing factors, including predictability of results, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum’s governmental interests, and application of the ‘better rule of law’ as factors influencing choice of law.

<sup>56</sup> Pioneering work on interest analysis is found in Brainerd Currie *Selected Essays on the Conflict of Laws* (1963) and Currie, B ‘Survival of Actions: Adjudication Versus Automation in the Conflict of Laws’ (1957-58) 10 Stanford Law Review 205. For more recent writing on interest analysis, see Harold Korn ‘The Choice of Law Revolution: A Critique’ (1983) 83 Columbia Law Review 772, Russell Weintraub ‘An Approach to Choice of Law That Focuses on Consequences’ (1993) 56 Alberta Law Review 701; Lawrence Kramer, L ‘Rethinking Choice of Law’ (1980) 80 Columbia Law Review 277 and Russell Weintraub ‘A Proposed Choice of Law Standard for International Products Liability’ (1990) 16 Brookings Journal of International Law 225.

<sup>57</sup> See, e.g., Carter, P B *supra* n 50 at 21.?? That author argues that interest analysis proceeds upon a ‘fundamental misconception concerning the ultimate purpose of civil litigation. That purpose is to do justice between the parties before the court’. It may be arguable in response that a fundamental purpose of tort law, including choice of law rules in tort, is efficient loss distribution. See Fleming, J in *Law of Torts* 9<sup>th</sup> ed (1998) which refers to a variety of purposes tort law serves, including deterrence, compensation and loss distribution. At page 12 the learned author refers to a ‘growing trend towards loss distribution’. See also Richard Posner, *The Economic Analysis of Law* 3<sup>rd</sup> ed (1986); William Landes and Richard Posner *The*

including in particular Brilmayer,<sup>58</sup> it is submitted that Australian courts may find interest analysis to be of assistance in this area in future years.<sup>59</sup> There is no support for interest analysis in Australian case law, although the Australian Law Reform Commission supported considering the purpose or object of laws in applying the choice of law rules, which is considered to be similar to interest analysis.<sup>60</sup> The Australian High Court made a cursory and arguably misleading reference to interest analysis in its *Pfeiffer* decision.<sup>61</sup>

A clear example of interest analysis occurred in the New York Court of Appeals decision in *Babcock v Jackson*,<sup>62</sup> to which reference has already been made. The case involved two New York residents, one driving the other to Canada for the weekend. While in Canada, the driver of the vehicle lost control and the car crashed. The vehicle was registered and insured in New York, and was garaged there. Both parties resided in New York, and their journey commenced, and would have ended, there. In other words, the location of the accident was merely fortuitous, similar to the situation before the House of Lords in *Chaplin v Boys*, and before the High Court in *Pfeiffer*. Ontario law would bar the action, New York law would allow it to be heard.

The court noted the general rule that the question would be governed by the law of the place of the wrong, and outlined the chief advantages of the rule as they saw them, namely certainty, predictability, and ease of application, as the High Court did in *Pfeiffer*. However, they noted the rule would sometimes lead to unfair results.

The court cited the *Kilberg* case, involving a New York resident being killed in a plane crash in Massachusetts. Massachusetts law contained a ceiling on the damages claimable by the deceased's family. In refusing to apply the Massachusetts ceiling, the New York court explained that the random chance that the event occurred in Massachusetts did not give that State a controlling interest or concern in the amount of tort recovery, due to New York's competing interest in providing full compensation for its residents or users of transportation facilities originating in New York. The deceased had bought her ticket from the defendant in New York, and the trip originated there.<sup>63</sup>

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*Economic Structure of Tort Law* (1987), and Australian Law Reform Commission *Choice of Law* (1992) para 6.13 'The rule [double actionability] is out of touch with modern trends in tort law which are more concerned with the distribution of loss and risk than the allocation of responsibility'. Some commentators suggest a stronger limit be placed on the application of forum law than interest analysis would allow. See, e.g., Simson, G J 'State Autonomy in Choice of Law: A Suggested Approach' (1978) 52 Southern California Law Review 61; Silberman, L 'Can the State of Minnesota Bind the Nation?: Federal Choice of Law Constraints After Allstate Insurance Co v Hague' (1981) 10 Hofstra Law Review 103.

<sup>58</sup> Lea Brilmayer 'Interest Analysis and the Myth of Legislative Intent' (1980) 78 Michigan Law Review 392, 398, 407 criticizing interest analysis (at least by Currie) as pro-resident, pro-forum and pro-recovery and leading to unpredictable results. She implies interest analysis does not genuinely seek to reflect the wishes or interests of legislatures.

<sup>59</sup> Mason CJ referred to the debate in *Breavington* supra n 18 at 82.

<sup>60</sup> *Choice of Law* (1992) para 6.65 'It is recommended that in interstate torts, the court take into account the purpose and object of laws in deciding whether to replace the *lex loci* with the place of greater connection'.

<sup>61</sup> *Pfeiffer*, supra n 2 at 537. The Court stated only that 'interest analysis has been doubted' citing curiously as support for the proposition a case commonly referred to as an example of an interest analysis approach (*Alaska Packers*) and then the work of Brainerd Currie, also an advocate of the approach.

<sup>62</sup> (1963) 12 NY 2d 473, 191 NE 2d 279.

<sup>63</sup> *Kilberg v Northeast Airlines Inc* (1961) 172 NE 2d 526, 527-528.



Turning its mind to this case, the court adopted a similar interest-weighting approach, in deciding whether to apply New York or Ontario law.<sup>64</sup> It found New York's concern in the matter was unquestionably the greater and more direct, and the interest of Ontario at best minimal. New York was the home of the driver and passenger, the place where the car was kept and insured, and where the journey began and was designed to end. Ontario's only connection was the 'purely adventitious circumstance' that the accident occurred there. Ontario had no conceivable interest in denying such a remedy in a suit between New York litigants for injuries suffered in Ontario because of conduct tortious under Ontario law. Their law was designed to prevent fraudulent insurance claims. There was no reason to depart from the New York policy of requiring a tortfeasor to compensate a person they have injured by their negligence.<sup>65</sup>

As well as currently being absent from Australian law, there is little reference to interest analysis being applied, at least explicitly, in the Canadian or New Zealand case law.<sup>66</sup> It is submitted, with respect, that the jurisprudence of both countries would benefit from a consideration of such factors, at least in some cases.<sup>67</sup>

## V CONDUCT REGULATION AND LOSS DISTRIBUTION

United States courts have recognized that different choice of law rules can apply to different issues put before the court for consideration. Specifically, they have recognized a distinction between what is known as 'conduct regulation' and 'loss distribution'. Different rules apply to these categories. Conduct regulation tends to be governed by the law of the place of the wrong, either with or without resort to interest analysis. Nevertheless, interest analysis would be readily applied to conduct regulation. A jurisdiction has a clear and strong interest in regulating conduct within its territory. It would be very difficult for another jurisdiction to claim it has a stronger interest in regulating conduct within another jurisdiction, than the jurisdiction itself would have. As

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<sup>64</sup> The approach taken is similar to that of the *Second Restatement*, which was in draft form at the time of the decision. For an excellent account of the important impact the *Babcock* decision has had on American jurisprudence, see Harold Korn 'The Choice of Law Revolution – A Critique' (1983) 83 Columbia Law Review 772.

<sup>65</sup> However, the result would be different if one of the parties resided in the law of the place of the wrong. This was confirmed in *Neumeier v Kuehner* (1972) 286 NE 2d 454, 456 where the wife of a Canadian resident sued after her husband was killed while a passenger in a car driven by a New York resident in Canada. The court applied Canadian law to the issue, noting that although New York has a deep interest in protecting its own residents, even when they are traveling interstate, it has no legitimate interest in ignoring the public policy of a foreign jurisdiction, Ontario in this case, and in protecting the plaintiff passenger living and injured there from legislation obviously addressed to a resident traveling in a vehicle within its borders.

<sup>66</sup> 'There is no indication that the policies underlying the substantive laws of potentially interested states were examined, nor were the factual contacts weighed.' Elsabe Schoeman, 'Tort Choice of Law in New Zealand: Recommendations for Reform' [2004] New Zealand Law Review 537.

<sup>67</sup> Schoeman suggests that in the New Zealand context, interest analysis might be particularly useful where it is impossible to determine the proper law of the tort objectively on the basis of a centre of gravity approach – 'in such cases it will be necessary to determine which jurisdiction has the greater interest in the application of its law on the basis of the policy or policies underlying the law.' *Ibid*, 560.

the court in *Babcock v Jackson* said, ‘where the defendant’s exercise of due care in the operation of his vehicle is in issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive, concern ... (because of) that jurisdiction’s interest in regulating conduct within its borders ... it would be almost unthinkable to seek the applicable rule in the law of some other place’.<sup>68</sup>

So recently in *Matson by Kehoe v Ancil*,<sup>69</sup> the issue was whether the parents of a child injured in a Vermont car accident were guilty of contributory negligence. At the time of the accident, the plaintiff’s mother was holding the child in her lap in the front passenger seat. The question of contributory negligence would be answered differently according to which law applied, the defendant being from Quebec. The court applied the law of the place of the wrong, Vermont, to the issue. The conclusion was that ‘because both the conduct and the injury occurred in Vermont ... [that state] ... had a strong and obvious interest in regulating the conduct of persons within its territory and in providing redress for injuries that occurred there’.<sup>70</sup>

Loss distribution is seen as something to which interest analysis (together, in some cases, with a proper law approach) is applied. Given that conduct regulation and loss distribution are decided by different rules, different law can apply to them. This is why in the 1997 *Matson* case the law of Vermont applied to the question of contributory negligence, but in the 1998 *Matson* case when the issue arose as to whether the defendant truck driver was an independent contractor or the agent of another defendant, the court viewed this as a loss distribution issue and applied Quebec law to the question. Quebec law had the greater interest in and closer connection with the issue because the truck driver and the corporation were both from that jurisdiction.<sup>71</sup>

So for example in *Babcock v Jackson* itself, the court found that the law of the forum should apply to the questions of liability because that jurisdiction had a closer interest in the issue than the alternative place of the wrong. The policy underlying the law of the place of the wrong would not be disturbed, the court found, if the law of the forum governed liability compensation issues.

While *Babcock v Jackson* dealt with a situation where the court applied interest analysis to find that the law of the forum governed compensation issues, the court can also apply interest analysis to find that the law of the place of the wrong governs these issues. A

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<sup>68</sup> (483), 191 NE 2d 284.

<sup>69</sup> (1997) 979 F Supp 1031.

<sup>70</sup> Ibid, 1035. Similarly in *Pittman v Maldania Inc* (2001) WL 1221704, the defendant operated a water ski rental office on the Delaware side of that State’s border with Maryland. The law of both states provided it was unlawful to rent skis to a person under 16, but the law of Delaware (only) also required that the person renting to produce a valid driver’s licence. The plaintiff, aged 14, obtained skis after misrepresenting his age. He was injured while riding the skis in Maryland. The court found the law of the place of the wrong (in this case Delaware, where the skis were hired) should apply. The Delaware law reflected a ‘clear policy against renting skis to people who are unable to produce a valid driver’s licence ... [as] part of a comprehensive statute on boating safety ... [and] a state statute regulating conduct should be enforced throughout the State’

<sup>71</sup> *Matson v Ancil* (1998) 7 F Supp 2d 423.

good example of this situation is *Myers v Langlois*.<sup>72</sup> There both of the relevant parties lived in a jurisdiction (Quebec) barring the plaintiff's action. The accident occurred in a state (Vermont) allowing the plaintiff's action. The action was brought in a Vermont court. That court concluded that the law of Quebec should apply, based on interest analysis. As the judges said:

Since the choice of law issue presented relates to allocation of post-event losses, not regulation of conduct, the goals of Vermont's system would not be realized by permitting the actions to go forward here. Quebec has demonstrated strong policy concerns by enacting a comprehensive automobile insurance act that provides no-fault compensation and allocates loss between Quebec residents. We therefore conclude that Quebec's significant interest in maintaining its no-fault insurance scheme outweigh the parties' contacts with Vermont.<sup>73</sup>

It should be pointed out the writer is not aware of any reference to the distinction between conduct regulation and loss distribution in any of the Australian, New Zealand or British conflicts jurisprudence.<sup>74</sup> However, the joint judgment in *Renault* contains the interesting aspect that the judges expressly reserved the question whether questions on kind, and quantification of, damage should be governed by the law of the place of the wrong.<sup>75</sup> This is interesting because the High Court has confirmed in cases such as *Stevens v Head*<sup>76</sup> that it views questions as to the heads of damage that may be recoverable as a matter of substance that should, according to the general rule adopted by the High Court in *Pfeiffer* and *Renault*, be resolved according to the law of the place of the wrong. Yet the High Court in *Renault* leaves open the question of which law to apply. This leaves open the possibility that in future cases, the High Court might adopt the distinction, in applying its conflict of law rules in torts cases, between issues of conduct regulation and loss distribution. In particular, it might confirm that the law of the place of the wrong should apply to questions of conduct regulation, but the issue of loss distribution might need a more flexible approach.

This distinction between conduct regulation and loss distribution makes strong analytical sense to the writer. There is no warrant for departing from the law of the place of the wrong regarding issues of conduct regulation. That jurisdiction has a right to regulate conduct that occurs within its boundaries. The rule meets the reasonable expectation of the parties that if they enter another jurisdiction, their conduct is subject to regulation by the government of that jurisdiction. The rule is simple to apply, certain, and unlikely to lead to anomalies.

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<sup>72</sup> (1998) 721 A 2d 129.

<sup>73</sup> *Ibid*, 132.

<sup>74</sup> However in *Boys*, some of the judges saw no difficulty with segregating issues, and applying different laws to them – for example, Lord Wilberforce ‘This issue, whether this head of damage should be allowed, requires to be segregated from the rest of the case ... and tested in relation to the policy of the local rule and of its application to these parties so circumstanced’ 389.

<sup>75</sup> *Supra* n 1 at 520.

<sup>76</sup> (1992) 176 CLR 433.

Compared with the issue of conduct regulation, loss distribution is more difficult. No general answer can be provided as to the correct approach, given the multitude of possibilities that may present themselves. However, in the simplest case where both parties are resident in one country/jurisdiction (A) and are involved in an accident in country B, it is surely true to say that country B has no real interest in determining the issue of the respective liabilities of the parties. The policy of that country's liability laws will not be thwarted if A's laws are applied to resolve the liability issues, in the case where both parties to the litigation are from that country. This situation is common in conflicts cases, including the facts raised in *Chaplin*, *Pfeiffer* and *Babcock*.

As James suggested, in reference to the *Pfeiffer* decision, the court should have considered whether 'the New South Wales legislature had any real interest in the application of its workplace scheme to an ACT employer's liability'.<sup>77</sup> Similarly, one could ask whether Malta had any interest in the application of its compensation laws to decide liability between British residents (the *Chaplin* situation), or whether the province of Ontario had any interest in the application of its compensation laws to decide liability between New York residents (the *Babcock* situation).

One might make the same comment in relation to the recent decision in *Union Shipping New Zealand Ltd v Morgan*.<sup>78</sup> There the plaintiff, a New Zealand resident working for a shipping company incorporated in New Zealand, was injured while the ship was unloading coal in a New South Wales port. He sued his employer at common law. New Zealand had a no-fault compensation scheme that would have prevented him bringing a common law action in that country. The New South Wales Court of Appeal found that New South Wales law applied to the action. Again, one might ask the question whether New South Wales had any interest in applying its tort law (allowing a common law action) to the claim, based as it was against a New Zealand employer, who had contributed to a compensation scheme for employees in that country.<sup>79</sup> Is it anomalous that had the plaintiff been unloading the coal in New Zealand, or in non-Australian territorial waters, his claim may not have been able to be brought?

It is submitted that the rule decided upon by the High Court in *Pfeiffer* (confirmed in *Renault*), while having the advantage of simplicity and certainty, cannot address this situation in an acceptable way – where the law of the place of the wrong is in a sense fortuitous, and the parties have no other connection with this place other than that fact.

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<sup>77</sup> Elizabeth James 'John Pfeiffer Pty Ltd v Rogerson: The Certainty of Federal Choice of Law Rules for Intranational Torts: Limitations, Implications and a Few Complications' [2001] 23 Sydney Law Review 145, 159.

<sup>78</sup> [2002] 54 NSWLR 690.

<sup>79</sup> It is submitted a correct application of interest analysis to this factual scenario would find New South Wales had no interest in the litigation. With respect, it is not to the point to conclude, as Heydon JA did in *Union Shipping*, that 'it cannot be said that New South Wales, whose citizens were receiving the coal, had no concern with the presence of the vessel'. Ibid, 731. If this was a purported application of interest analysis, it is submitted with respect not to be an accurate one. His Honour went on to say that 'it is difficult to see how anything in the nature of an onerous or disruptive burden would be created by applying New South Wales law'. Ibid. With respect, this is not an accepted test for deciding on questions of *choice of law*.

This problem applies both in relation to international torts, and in torts involving more than one Australian jurisdiction.

Other possibilities may present themselves. It may be that one of the parties may live in the jurisdiction where the accident occurred, with the other living in the forum jurisdiction. Some United States courts would solve this problem by applying an interest analysis to the question of loss distribution. The High Court would apparently apply the law of the place of the wrong, inflexibly if dealing with an interstate conflict. The result would be more interesting if it were dealing with an international conflict. It outlined in *Renault* that in such cases the law of the place of the wrong would continue to apply. It may adopt an exception based on public policy considerations. But what of the High Court's reservations in *Renault* on the distinction it agreed to it *Pfeiffer* between matters of substance and matters of procedure, and particularly its comments that it reserves the question whether issues regarding quantification of damages is in fact a matter for the place of the wrong, in relation to international cases?<sup>80</sup>

Is this far from the approach of the United States which reserves the issue of loss distribution to the place with the closer connection with the parties, involving questions of policy? It was suggested earlier that the High Court in *Renault* may have been indicating it would apply questions of policy in its classification of issues, including quantification of damages, as either substantive or procedural.

The matter must remain for the moment one of conjecture only, but it is quite conceivable given the Court's comments in *Renault* that one day, it may (as a matter of policy) determine issues of quantification of damages, in relation to an action brought in Australia based on a tort committed overseas, according to the law of the forum (Australia). The policy reason for this may be that the foreign jurisdiction does not recognize heads of damage that Australian law does (the situation in *Chaplin*), together with (or as an alternative) the argument that deciding issues of loss distribution by the law of the forum (Australian law) does not, as a matter of international comity, interfere with the sovereignty, public policy or interest of the foreign jurisdiction in the matter at hand. If the Court were to take this step, it would be justified in doing so by referring to the United States distinction between conduct regulation and loss distribution.

## VI CONCLUSION

It is submitted that the Australian High Court has generally taken a very positive step recently in stating the law of the place of the wrong as the only law to be applied in relation to torts involving more than one state, and as (at least) the primary law to be applied in relation to international torts.

The author prefers this approach to the continuing adherence to the double actionability rule evident in the New Zealand law. There is surely no justification for continuing to

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<sup>80</sup> Compare the approach of the Supreme Court of California in *Tucci v Club Mediterranee SA* (2001) 107 Cal Rptr 2d 401, where the court applied the law of the place of the wrong, the Dominican Republic, to determine what remedies were available to the plaintiff, rather than the law of the forum

require that the law of the forum provide recovery in the matter, a la *Phillips v Eyre*. It is submitted to be an anachronistic rule, overturned by legislation or case law in most jurisdictions. New Zealand is one of the few to continue to adhere to it. Of course, that fact alone is not grounds for it to be overturned, but when many other countries recognize the previous law is no longer desirable, if it ever was, it surely justifies a rethink. The *Phillips* approach may be based on an overly-parochial approach to questions of choice of law, a disdain for legal systems other than the one the judge belongs to, or a difficulty in obtaining the substantive law of other countries. Surely, none of these justifications can withstand serious scrutiny in 2005.

However, in future the High Court may need to consider increasing flexibility in the application of its choice of law rules, as at least Kirby J on the current bench has conceded. Just as New Zealand has become isolated in its adherence to double actionability, Australia has become isolated in its rejection of a flexible exception to choice of law questions. It is an isolation which surely cannot continue. The article has pointed out that facts like those in *Kuwait Airways* would strain the High Court's newly-adopted test and hopefully make it reconsider its antipathy towards a flexible exception.

There is a rich North American jurisprudence in relation to questions of policy (albeit in a different context), including the possibility of answering different questions that may arise in a conflicts case by applying different laws, and interest analysis to weigh up competing interests in particular cases. Such an approach also commended itself to the British legislators.

The author has concluded against creating any exception to choice of law rules based only on 'policy'. As has been seen, the concept is fraught with uncertainty. It has been used in different ways by different courts. The record of the High Court in various fields in applying the concept of 'policy' has not been an envious one, creating uncertainty, and perhaps masking views and considerations that are not always expressed clearly. The author would prefer a more explicit and transparent solution.

The conclusion reached by the writer is that matters of conduct regulation should be regulated by the law of the place of the wrong, without exception. This rule should apply both in interstate and international torts cases. This result is generally consistent with the High Court's stated preference in *Pfeiffer* for rules in this area to be as simple as possible, consistent, and certain. It meets legitimate expectations that a person who is present within a jurisdiction submits to that jurisdiction's conduct regulation rules. That jurisdiction has a strong interest in developing and enforcing conduct standards that apply to all within its borders.

However, it is concluded that the question of loss distribution is a more vexed one. There is much to be said for the argument that the law of the place of the wrong should not apply to this issue in the case where that country's government (and/or law) has no interest in the allocation of responsibility between the parties. This may be because the parties do not reside in that jurisdiction, have no interest in it, and where the policy intent of that country's relevant laws would not be thwarted by their non-application to the loss

allocation decision in the case at hand.<sup>81</sup> It is conceded here that it may be a difficult matter of evidence to determine in all cases the policy intent of the relevant legislatures. However, this should at least be a genuine exercise, and not a sham to justify applying the law of the forum, to take into account Brilmayer's forum-bias concerns with interest analysis.

As a result, it is suggested that where the issue is one of loss distribution, the court should not automatically apply the law of the place of the wrong to resolve the issue (current Australian position), nor generally apply the law of the forum (current New Zealand position). Perhaps this could be the starting point, or initial presumption, as currently occurs in New Zealand. The question should be answered by considering interest analysis, and whether the policy intent of each of the relevant legislatures in the tort field would be thwarted if their law did not apply to resolve the issue. This change to the current Australian position could be achieved through development by the courts, but perhaps the preferable approach is to legislate the exception to clarify the issue, as the United Kingdom did. The legislation could clarify the general rule subject to displacement, precisely which considerations were relevant in applying the interest analysis approach to loss distribution, and what kind of evidence might be appropriate to determine the issue. This is seen as preferable to a vague judicially crafted exception based on 'policy'.

It is also suggested that New Zealand should abandon its double actionability test, in favour of primacy being given to the law of the place of the wrong, subject to an exception in the area of loss distribution, along the lines (broadly) of the position in the United Kingdom, but allowing for a different approach to the issues of conduct regulation (inflexible) and loss distribution (flexible). Thus the author contends that an Australian court and New Zealand court should adopt similar positions on this difficult issue.

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<sup>81</sup> This is acknowledged as a hybrid of interest analysis and proper law approach, an approach certainly not without support in the literature, see *supra* n 58.